BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

TERRY E. OWEN Claimant	)	
VS.	)	
L & T INSULATION, INC. Respondent	)	Docket No. 1,002,248
AND	)	
EMPLOYERS MUTUAL CAS. CO. Insurance Carrier	)	

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier (respondent) requested review of the January 20, 2012, Post Award Medical Award entered by Administrative Law Judge Nelsonna Potts Barnes. The Board heard oral argument on March 6, 2012. W. Walter Craig, of Derby, Kansas, appeared for claimant. Richard L. Friedeman, of Great Bend, Kansas, appeared for respondent.

The Administrative Law Judge (ALJ) found that claimant's current need for medical treatment is causally related to his work injury of February 14, 2001, and granted claimant's request for authorization for a neurosurgical consultation and surgical procedure.

The Board has considered the record and adopted the stipulations listed in the Post Award Medical Award.[1]

ISSUES

Respondent argues that claimant did not meet his burden of proof that his current need for medical treatment is causally related to his work-related injury of February 14,

[1] The record is further itemized in the February 2, 2007, Award.

2001. In the alternative, respondent contends the medical treatment ordered is not necessary or appropriate.

Claimant asserts he has met his burden of proving that he is in need of a surgical consultation and that this need is causally related to his work injury of February 14, 2001.

The issues for the Board's review are:

(1) Is claimant's current need for medical treatment a natural and probable consequence of his work-related injury of February 14, 2001?

(2) Is the medical treatment approved by the ALJ necessary and appropriate?

FINDINGS OF FACT

Claimant was injured at work on February 14, 2001, when he pulled at a 300-pound manhole cover and immediately felt pain in his neck and down both his upper extremities. Dr. Robert Eyster was authorized as claimant's treating physician. An MRI of claimant's cervical spine performed May 22, 2001, showed mild degenerative changes at C4-C5 and C5-C6 with straightening of lordosis. The MRI also revealed a mild disk/osteophyte complex at C5-C6 and mild stenosis at C4-C5 and C5-C6. Claimant was treated with medication and periodic epidural injections. Nevertheless, his symptoms worsened.

Claimant filed an Application for Hearing on February 15, 2002, claiming injuries to his neck. After a preliminary hearing held April 16, 2002, the ALJ granted claimant's request for medical treatment for his neck injury.[2] Respondent appealed the ALJ's order, arguing in part that claimant continued to injure his back while working for a different employer. Board Member Peterson found that "although claimant continued to perform physical work after the February 14, 2001 accident, there is no evidence that those physical work activities resulted in either a new injury or an aggravation of his preexisting neck condition."[3] An Award was entered in the case on February 2, 2007, wherein the ALJ found that claimant had an 8 percent impairment to the body as a whole. The Award included an order for future medical benefits upon proper application to and approval of the Director. No appeal was taken from the Award.

Claimant was off work a short time after the accident and then returned to work, not for respondent but for High Plains Insulation (High Plains). He performed the same job tasks for High Plains that he performed at respondent before his injury. At some point, claimant began to work for Industrial Commercial Insulation. Again, he testified he is doing

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[2] ALJ Order (Apr. 16, 2002).

[3] *Owen v. L & T Insulation, Inc.*, No. 1,002,248, 2002 WL 1340512 (Kan. WCAB May 31, 2002).

the same kind of work he previously performed at respondent and High Plains. The jobs included being on a ladder and working overhead. Claimant said Dr. Eyster has told him to do his best to keep his work at eye and chest level. However, sometimes he is called upon to do overhead work. Claimant said he has pain in his neck whether he is working or not. In his opinion, the progression of his pain has nothing to do with working overhead, pulling, or anything else he might be doing at work. Sometimes the pain just flairs up.

Dr. Eyster has presented the option of surgery to claimant since at least 2003. In a letter to respondent's attorney dated June 10, 2003, Dr. Eyster stated:

> The patient has been presented with options including the option of having his C5-6 region decompressed and fused. I think reasonably he prefers as long as he can get along with conservative management of the type that he has had to live with the symptoms.
>
> In an ideal world, it might be best that he not do activities that require looking up and down or reaching overhead and doing those sorts of activities because those activities probably do cause some increased irritation and aggravation as opposed to activities that do not require that amount of neck stress. I doubt that these activities are going to influence an eventual need for a fusion and decompression of the cervical spine.[4]

Dr. Eyster's medical note of May 12, 2005, indicated he thought "it is time to strongly consider evaluation by a neurosurgeon to see if surgery is reasonable."[5] However, claimant preferred to first try a different medication.

Dr. Eyster's medical notes also indicate that claimant has cervical degenerative disc disease. On May 12, 2008, claimant's chief complaint to Dr. Eyster was continuing neck pain "when he overdoes things."[6] Dr. Eyster stated that claimant would need to continue medication. "The patient is still symptomatic as a result of the original injury. He does not have new findings of a new injury and this is a result of the original injury process with stabilization of symptoms with medication."[7]

On February 16, 2011, Dr. Eyster noted that claimant's neck pain was only relieved for six to eight weeks after an epidural at C4-5. After that period, the pain returned and was worse. Dr. Eyster noted that claimant "would like to have a consultation for possible

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[4] P.A.M. Hearing Trans., (Aug. 2, 2011), Resp. Ex. 2.

[5] P.A.M. Hearing Trans. (Aug. 2, 2011), Resp. Ex. 3.

[6] P.A.M. Hearing Trans. (Aug. 2, 2011), Resp. Ex. 4.

[7] *Id.*

surgical intervention. I think that is reasonable. . . . I think he may require a discectomy and fusion at C4-5 and 5-6."[8]

Dr. Paul Stein, a board certified neurosurgeon, first examined claimant on January 31, 2006, and saw him a second time on May 17, 2011, both times at the request of respondent's attorney.

On January 31, 2006, claimant's chief complaint to Dr. Stein was neck pain. He complained of pain at the base of his neck that extended into both upper extremities, left greater than right. After review of claimant's medical records, including the MRI scans, and performing a physical examination, Dr. Stein opined that claimant had multilevel degenerative disc disease in his cervical spine. He said it appeared the degenerative disease had progressed. It was Dr. Stein's opinion that claimant had an aggravation of his preexisting degenerative disease at work on February 14, 2001. But, Dr. Stein believed the progression of the degenerative disease was a natural progression of the disease itself and was not related to the work injury.

On May 17, 2011, claimant told Dr. Stein that he was having constant pain in his neck extending into both arms, primarily in the shoulders and upper arms, worse on the left than the right. Claimant said he could hardly lift his left arm overhead. He reported aching and burning sensations and had trouble sleeping. He also indicated he had numbness and tingling in both upper extremities with a tendency to drop objects from his left hand. Claimant said he had no new injuries or accidents. He was working full time with no official medical restrictions. He told Dr. Stein he did not do overhead work and had restricted himself to work at chest level since his 2001 injury. Nevertheless, Dr. Stein believes there was probably still some aggravation occurring, at least some symptomatic aggravation, depending upon whether the overhead work was repetitive or a rare occurrence.

Dr. Stein reviewed several MRI scans of claimant's cervical spine. The scan performed on May 22, 2001, showed mild degenerative change at C4-C5 and C5-C6 with straightening of lordosis. There was a mild disk/osteophyte complex at C5-C6 and mild stenosis at C4-C5 and C5-C6. An MRI of June 6, 2004, was similar to that of May 22, 2001. On an MRI taken January 22, 2010, the C4-C5 level looked essentially the same but at C5-C6 on the right, the disk/osteophyte complex was significantly larger and was causing right-sided spinal cord compression.

In examining claimant on May 17, 2011, Dr. Stein found claimant had a decrease in range of motion of his neck. He examined claimant's left shoulder and found a decrease in active range of motion in flexion, abduction and external rotation. He also found moderately severe weakness of external rotation of the left shoulder. Dr. Stein said those symptoms are fairly typical for a rotator cuff tear or rotator cuff weakness. To be certain

[8] P.A.M. Hearing Trans., (Aug. 2, 2011), Cl. Ex. 1.

of that diagnosis, a left shoulder MRI scan or arthrogram would be necessary. But Dr. Stein believed there was a reasonable likelihood that claimant had a rotator cuff tear. If claimant had a rotator cuff tear, it would not be related causally in any way to his injury in 2001. If claimant does not have a rotator cuff injury, that would indicate to Dr. Stein that all of his symptomatology was coming from the cervical spine, which he finds difficult to believe because claimant's MRI scan shows a large disk osteophyte complex at C5-C6 on the right, which would not affect his left shoulder or arm.

Dr. Stein said that based on the information he reviewed and on his physical examination of claimant's neck, he opined that surgery to claimant's cervical spine at this time would not be related to claimant's work injury of 2001. Surgery was not a natural and probable consequence of claimant's 2001 injury. Dr. Stein believed that claimant has a natural progression of a degenerative process and stated the degenerative process has progressed considerably. However, Dr. Stein does not believe that claimant's work-related accident accelerated his degenerative disc disease.

Dr. Stein said an MRI-Arthrogram should be taken of claimant's left shoulder to determine if he has a rotator cuff tear. In terms of the cervical spine, Dr. Stein suggested an EMG nerve conduction test as well as another MRI scan. If the MRI scan was not clear and sharp, then Dr. Stein would talk about a cervical myelogram and a CT scan. Dr. Stein said all those things would be addressed if claimant was referred for a neurosurgical consultation.

Dr. David Hufford is board certified in family practice and is a board certified independent medical examiner. He had originally evaluated claimant on August 8, 2006, at the request of claimant's attorney. Claimant complained at that time of a burning sensation at the base of his neck with an aching-type pain into both upper arms extending to the elbows, left greater than right. He also had numbness of both arms extending into his hands and fingers which he described as "tingling." After reviewing claimant's medical records and performing a physical examination, Dr. Hufford diagnosed claimant with cervical radiculopathy. He believed claimant's symptoms were progressive and causally related to the accident of February 14, 2001. In his August 8, 2006, report, Dr. Hufford opined: "While [claimant] may have experienced mild progression of his underlying cervical degenerative disc disease, the proximate cause of his current symptomatology remains this work-related injury . . ."[9] He further recommended that "strong consideration be given to referral to a neurosurgeon or orthopedic surgeon conversant in cervical spine procedures."[10]

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[9] Hufford Depo. (Aug. 9, 2011), Ex. 2 at 2.

[10] *Id.*, Ex. 2 at 3.

Dr. Hufford evaluated claimant a second time on July 5, 2011, at the request of claimant's attorney. Claimant told him he was still doing relatively heavy manual labor that was similar to the job he was performing when he was injured in 2001. Dr. Hufford reviewed the medical records of Dr. Eyster from August 8, 2006, to the date of his second evaluation, as well as his medical report of August 8, 2006. He took a history from claimant and performed a physical examination. He reviewed the MRI scans from 2001, 2004 and 2010 and noted claimant had evidence of cervical degenerative disc disease at C4-C5 and C5-C6 and there was minor progression of the disease at those levels. He diagnosed claimant with work-related injury to the cervical spine with significant residual symptomatology and progression. Dr. Hufford said he examined claimant's left shoulder and did not find anything that he would consider consistent with rotator cuff pathology.

Dr. Hufford testified that claimant continued to have symptoms, and it was his opinion that the symptoms were directly caused by the work injury of February 14, 2001. Since the last time Dr. Hufford had seen claimant, claimant had been treated with medication and epidural injections, which had become less and less beneficial. Dr. Hufford opined that claimant was at a point that surgery for his cervical spine needed to be considered to help relieve the effects of the 2001 injury.

Dr. Hufford stated that claimant had no new injury, which he defined as "some specific event that altered his tissue in some way, creating new symptomatology or some other alteration in his physiology that would constitute a separate and unique event."[11] Claimant told Dr. Hufford he was still able to work. He was on medications to try to limit the pain. Dr. Hufford stated that he did not think claimant's work activities were causing an acceleration of his degenerative disc disease, so there was no structural or physiologic reason to limit his work activities.

PRINCIPLES OF LAW

In a post-award medical proceeding, an award for additional medical treatment can be made if the trier of fact finds that the need for medical care is necessary to relieve and cure the natural and probable consequences of the original accidental injury which was the subject of the underlying award.[12]

In claimant's request for post-award medical treatment, he has the burden to prove his right to an award of compensation and prove the various conditions on which his right depends.[13] That burden remains the same even if claimant has suffered intervening accidents. It is simply a matter of proof. And although the passage of time and intervening

[11] Hufford Depo. (Aug. 9. 2011) at 12.

[12] K.S.A. 44-510k(a) (Furse 2000).

[13] K.S.A. 44-501(a) (Furse 2000).

accidents may increase the claimant's difficulty in establishing the causal connection, nonetheless, there are no prohibitions against claimant attempting to prove the current need for medical treatment is related to the previous compensable work-related injury.

In *Logsdon*,[14] the Kansas Court of Appeals stated:

> Whether an injury is a natural and probable result of previous injuries is generally a fact question.
>
> When a primary injury under the Worker's Compensation Act is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury, including a new and distinct injury, is compensable if it is a direct and natural result of a primary injury.
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> When a claimant's prior injury has never fully healed, subsequent aggravation of that same injury, even when caused by an unrelated accident or trauma, may be a natural consequence of the original injury, entitling the claimant to postaward medical benefits.

In *Casco*,[15] the Kansas Supreme Court states: "When there is expert medical testimony linking the causation of the second injury to the primary injury, the second injury is considered to be compensable as the natural and probable consequence of the primary injury."

Where respondent is asserting an intervening injury, it is respondent's burden to prove that the intervening injury was the cause of claimant's permanent impairment rather than the work-related injuries.[16]

ANALYSIS

In her Award of November 20, 2012, the ALJ made findings of fact and conclusions of law that are accurate and supported by the record. The Board adopts those findings and conclusions as its own as if specifically set forth herein. The Board is persuaded by the testimony, and in particular the opinions of Dr. Eyster, that claimant is in need of additional medical treatment to cure and relieve the effects of his work-related injury.[17]

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[14] *Logsdon v. Boeing Company*, 35 Kan. App. 2d 79, Syl. ¶¶ 1, 2, 3, 128 P.3d 430 (2006); see also *Leitzke v. Tru-Circle Aerospace*, No. 98,463, unpublished Court of Appeals opinion filed June 6, 2008.

[15] *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, 516, 154 P.3d 494, *reh. denied* (2007).

[16] *Desautel v. Mobile Manor Inc.*, Nos. 262,971 & 262,972, 2002 WL 31103972 (Kan. WCAB Aug. 29, 2002), *cf. Palmer v. Lindberg Heat Treating*, 31 Kan. App. 2d 1, 4, 59 P.3d 352 (2002).

[17] It is noted that Dr. Eyster has been authorized to treat claimant since before the original Award. Respondent has never de-authorized Dr. Eyster or his referrals and, as such, the ALJ's Post Award Medical Award simply continues the status quo with respect to claimant's treatment.

Claimant's work activities since the date of the original Award of February 2, 2007, did not constitute an intervening accident and injury such that respondent would be relieved from liability for providing claimant's medical treatment.

CONCLUSION

Claimant has met his burden of proving that his current condition and need for treatment is a direct and natural consequence of his February 14, 2001, work-related injury. The ALJ's decision to authorize claimant to return to Dr. Eyster for treatment, including a referral to a neurosurgeon, should be affirmed.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Post Award Medical Award of Administrative Law Judge Nelsonna Potts Barnes dated January 20, 2012, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of April, 2012.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: W. Walter Craig, Attorney for Claimant
Richard L. Friedeman, Attorney for Respondent and its Insurance Carrier
Nelsonna Potts Barnes, Administrative Law Judge